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Via CM/ECF

The Honorable Allyn R. Ross
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Mirkin, et al. v. XOOM Energy, LLC, et al.*; No. 1:18-cv-02949-ARR-JAM

Dear Judge Ross:

I write to request an agreed two-week extension of the briefing deadlines for XOOM’s motion to exclude the “Amended” Report Plaintiff served on May 10. No other deadlines will be affected. The parties will still move to exclude all timely expert opinions and file other motions *in limine* by the May 20 deadline. Under this schedule, XOOM will move to exclude Plaintiff’s “Amended” Report as untimely on June 3, Plaintiff will respond by June 28, and XOOM will reply by July 12. Plaintiff disagrees with XOOM’s arguments but consents to this schedule.

XOOM requests this additional time because, despite Plaintiff’s prior assurances to XOOM and the Court, the so-called “Amended” Report served Friday is not the same methodology with new math. It makes no attempt to feed new data into the “Model Two” algorithm that Plaintiff used to secure class certification and oppose decertification, opting instead to build three brand new models—which are titled Methods A, B, and C—using data that was in Plaintiff’s possession when expert discovery closed.

The last-minute overhaul of the models is so extensive that XOOM needs a short extension just to process it, discuss it with XOOM’s expert, and prepare a motion that describes why the depth of the changes means they are not merely Rule 26(e)(2) supplements. XOOM cannot attempt to meaningfully challenge the substantive flaws in these new models without a chance to re-depose Plaintiff’s expert and prepare a rebuttal report. But none of those things should happen because the report is so untimely. A two-week extension just to move on timeliness grounds is necessary. Otherwise, under the current schedule, XOOM will have only one week to move, while Plaintiff will have three weeks to respond.

The parties therefore request new deadlines by which XOOM moves to exclude Plaintiff’s “Amended” Report as untimely on June 3, Plaintiff responds by June 28, and XOOM replies by July 12. We appreciate the Court’s time and attention to this matter.

Respectfully Submitted,

/s/ Michael D. Matthews, Jr.

Michael D. Matthews, Jr.

MCDOWELL HETHERINGTON LLP

Counsel for Defendants